No. 9403

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

11

UNITED STATES OF AMERICA,

Apellant,

vs.

THE OREGON SHORT LINE RAILROAD COMPANY, a corporation and SAINT PAUL-MERCURY INDEMNITY COMPANY of ST. PAUL, a corporation,

Appellees.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

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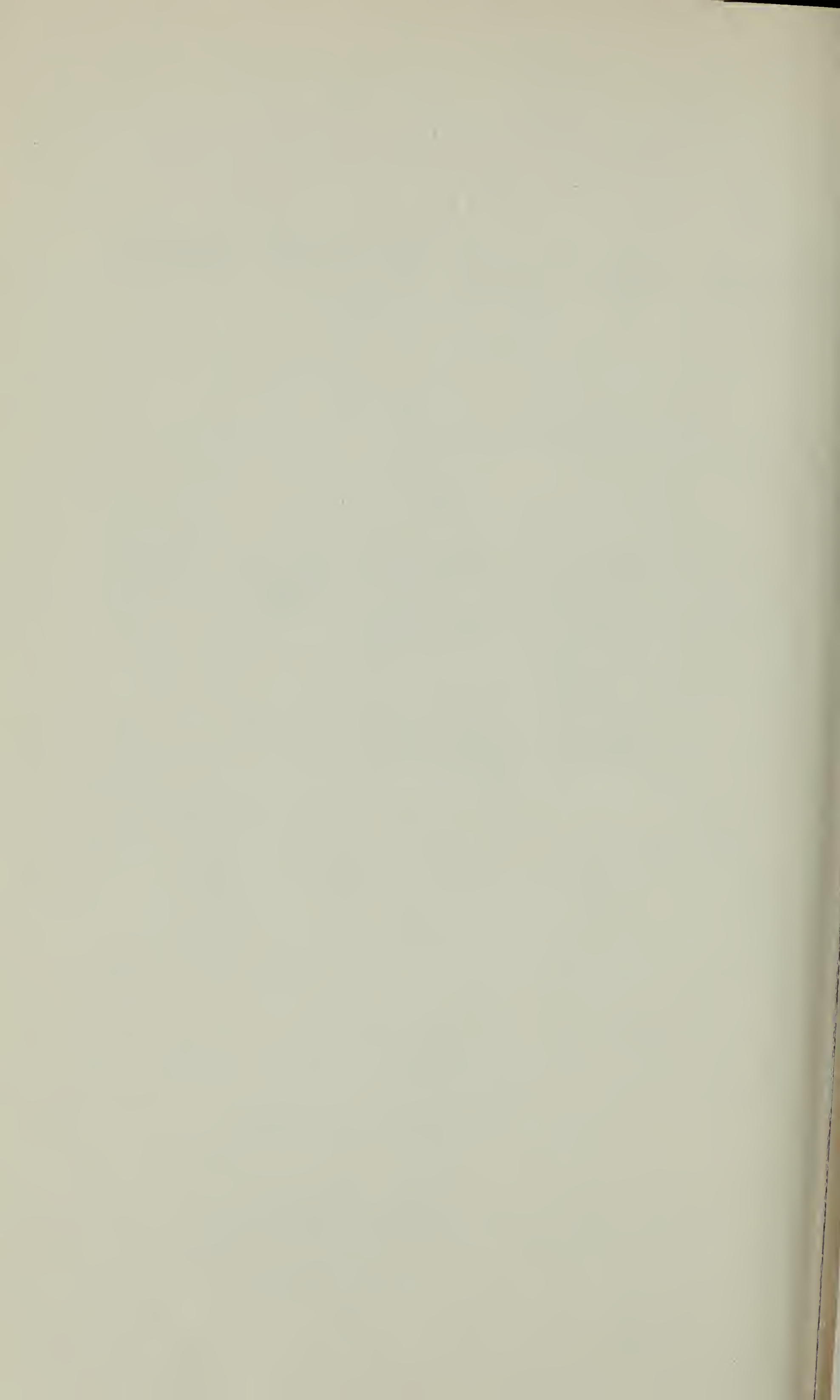

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court is not reported but may be found in the record at pages 36-43.

JURISDICTION

This suit was instituted by the United States on behalf of the Shoshone and Bannock tribes of Indians under authority of the Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the District Court was invoked under section 14 of that act (R. 3). The judgment of the District Court dismissing the complaint was entered September 19, 1939 (R. 44-45). Notice of appeal was filed December 9, 1939 (R. 45-46). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether, under act of Congress of September 1, 1888, 25 Stat. 452, confirming a treaty with the Shoshone and Bannock tribes of Indians for the relinquishment by them of a railroad right of way 200 feet wide in consideration of the payment of $8.00 per acre therefor, and a bond given pursuant to such act of Congress conditioned for the due payment of any and all damages which might accrue to the Indians, the railroad company and its surety were liable for the death of an Indian within the limits of the reservation in consequence of having been struck by a railroad train but without negligence on the part of the railroad company.

2. Whether the act, if construed as imposing unconditional liability, infringes the rights guaranteed to the appellees under the Fifth Amendment to the Constitution of the United States.

STATUTES INVOLVED

Section 14 of 25 Stat. 452 is set forth at page 4 of the appellant's brief.

The treaty with the Indians upon which the statute was based, and the portion of the statute granting the right of way, are set forth in the appendix hereto, pp. 28-31.

STATEMENT OF THE CASE

This is an action to recover $10,000.00 on a bond given by the Oregon Short Line Railroad Company to secure the payment of "all damages which may accrue" on account of the killing or maiming of certain Indians, and their livestock, on the Fort Hall Reservation, in southern Idaho. So far as the right to the collection of damages is concerned, all that is

alleged in the complaint is that on May 27, 1887, the Fort Hall and Bannock Indians made a memorandum of agreement with the United States for the relinquishment and sale, for the sum of $8.00 per acre, to the Utah and Northern Railroad Company of a right of way 200 feet wide, upon which railroad tracks had been constructed, which agreement is not set forth nor its limits expressed in the complaint (R. 6, 19). The complaint further alleges the enactment of a law ratifying the agreement, which also provided that the railroad company should execute a bond in the penal sum of $10,000.00 for the use and benefit of the Indians "conditioned for the payment of any and all damages which may accrue" by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or their livestock (R. 6-7). It is further alleged that a bond was executed and delivered in comformity with the Act of Congress (R. 8-9). In that connection it is alleged, we believe erroneously, "that for the privilege of maintaining and operating said railroad trains, engines, and cars over, through and across said Fort Hall Reservation, and by reason of the provisions of said treaty agreement, and said Act of Congress," the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company executed the bond (R. 8), which bond bears date July 30, 1935 (R. 10). The Act of Congress of September 1, 1888, 25 Stat. L. 452, recites that the railroad had then been constructed and the treaty agreement merely provided for the payment of $8.00 per acre, without reference to any bond, and the bond was given merely by virtue of the provisions of Sec. 14 of the Act of September 1, 1888, which did not make the giving of such bond a condition precedent to the railroad company, or its successor,

operating their trains over the right of way which they had acquired for value received. The bond was merely to insure the payment of "damages which may accrue" subsequently —in this case subsequent to July 30, 1935 (R. 10).

It is next alleged that on January 19, 1938, at a point on the reservation where the Indians in question had a right to be, the Ford automobile in which they were riding was struck by a train of the Oregon Short Line Railroad Company, and four Indians killed (R. 11-12). Nothing else concerning the circumstances of the collision is alleged. It is not alleged that the Railroad Company was guilty of any negligence. It is alleged in conclusion that by reason of the matters and things therein set forth there was due and owing from the defendants the sum of $10,000. No facts were alleged indicating the financial injury sustained by anyone further than that the funeral expenses involved amounted to approximately $2,500.00 (R. 12). It was alleged in Par. XIII of the complaint that all of the Indians killed or injured were members of the Shoshone and Bannock tribes residing on the Fort Hall Indian Reservation (R. 11), which was denied by the defendants (R. 31).

The answer of the defendants for a first defense challenged the sufficiency of the complaint to state a claim against the defendants upon which relief could be granted (R. 28); it then admitted the first seven paragraphs of the complaint, in which it was alleged that the Oregon Short Line Railroad Company was the successor in interest of the Utah and Northern Railway Company named in an Act of Congress, 25 Stat. L. 452, and that on July 3, 1868 the United States had made a treaty with the Shoshone and Bannock Indians creating a reservation; admitted that a report had been made to Congress of the tenor and effect of Exhibit "A" attached

to the complaint; admitted the making of a treaty between the United States and the Indians, and its ratification by Congress; admitted the execution of the bond pursuant to the Act of Congress, but not otherwise (R. 8, 30) ; admitted that by reason of said Act of Congress and said bond the defendants became obligated to pay such legal damages as might accrue to the Indians by reason of the killing or maiming of any of them (R. 30), but denied that the defendants by reason of said bond and the law applicable thereto had become liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring without fault or negligence of the railroad company (R. 31) ; admitted that certain Indians were killed in a collision between a locomotive engine owned and operated by the Union Pacific Railroad Company upon said line of railroad and an automobile occupied by said Indians (R. 31) ; admitted that demand had been made upon the defendants to pay the sum of $10,000.00 and that they had refused (R. 32), and by way of separate defense alleged that the plaintiff, appellant herein, sought recovery solely upon the statute, 25 Stat. L. 452, and the bond given pursuant thereto; that the statute did not create a right of action for death of a human being, or provide any measure of damages, therefore, that the statute was merely one providing for the giving of a bond to secure the payment to the United States for the use and benefit of the Indians' damages which might lawfully accrue to them in consequence of the violation of their legal rights by the railroad company; that the bond was no broader than the statute, and that to render judgment in favor of the plaintiff and against the defendants would deprive the defendants, and each of them, of property without due process of law, con-

trary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States (R. 33).

The plaintiff, appellant herein, moved to strike from the answer of the defendants the third defense, and also moved the court for summary judgment upon the ground that the pleadings created no issue as to any material fact and that the moving party was entitled to judgment as a matter of law (R. 34-35). The minutes show that upon the argument counsel for the respective parties requested the court to consider and pass upon the sufficiency of the complaint (R. 36), and thereafter the court rendered its decision, in which (R. 36-43) it expressed the opinion that the statutes and the bond did not create an unconditional liability but concluded that damages did not accrue without the invasion of a legal right, that is, without negligence, and that accordingly the complaint did not state facts sufficient to constitute a cause of action, that the first defense set up in the answer should be sustained and the motions of the plaintiff to strike and for summary judgment should be denied, and it was so ordered (R. 43-44). The plaintiffs electing not to plead further but to stand on their complaint, and the time for pleading over having expired, judgment of dismissal was rendered (R. 45), from which this appeal is taken.

We feel that neither by the bare statement of the issues made by the pleadings, nor the statement contained in appellant's brief, can a clear and comprehensive picture be presented. We therefore undertake, as briefly as possible, to present in chronological order, within the limits of the record, the events which culminated in this suit.

On March 3, 1873 Congress passed an act, 17 Stat. L. 612,

20 Stat. 241, granting to the Utah and Northern Railroad Company a right of way over the public lands for the construction of a railroad from Utah northerly through the state of Idaho and into Montana, to connect with the Northern Pacific railroad. In the report, Exhibit "A" of the complaint, (R. 15), it is stated that the Utah & Northern Railway Company filed in the Department of the Interior a series of fifteen maps of different locations of its road, eleven of which were approved March 6, 1882, and that the other four, showing the line of the road through the Fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian Reservation, which was not public lands within the meaning of the Act, and further that the consent of the Indians had not been formally obtained and no compensation had been made to them. The grant contained no reservation with reference to public lands or Indian reservations, but the treaty with the Indians relinquished to them all title to the land within the reservation (R. 4), which constituted sufficient justification for the rejection of the maps in question. The general right of way act of March 3, 1875, 18 Stat. 482, by section 5, expressly excluded lands within the limits of an Indian reservation and other lands enumerated in section 5 of the act. It may be inferred that the Utah and Northern Railway Company thereupon appealed to Congress, whose settled policy it was "to encourage the settlement of lands in the territories, and the development of their vast natural resources" etc. (R. 20), for it appears from the report that a detailed history of the matter is set out in a message sent to Congress December 21, 1885 and printed as Ex. Doc. No. 20, 49th Congress First Session (R. 16). Thereupon Rob-

ert S. Gardner, United States Indian Inspector, and Peter Gallagher, United States Indian Agent, were specially detailed by the Secretary of the Interior to carry on negotiations with the Indians for their relinquishment to the United States of a right of way for the railroad company across the reservation, and for the relinquishment of approximately 1840 acres of land for the platting of a townsite (which was in fact Pocatello) 25 Stat. L. 452 (R. 16), and on May 27, 1887, an agreement was signed between the above representatives of the Government and the Indians, which is recited in 25 Stat. 452, and which appears in Appendix "1" hereto. The agreement, so far as the railroad company was concerned, merely consented and agreed to the relinquishment of a right of way 200 feet wide with additional lands for station grounds in consideration of the payment to the Secretary of the Interior for their use and benefit of the sum of $8.00 per acre. No reference to a bond of any kind, nor of liability for damages, appears in the agreement, and the price of $8.00 per acre was apparently agreed upon as fair compensation for the reason that the Oregon Short Line Rail*way* Company had paid to them $7.77 per acre for 772 acres of right of way (R. 15). The Act of September 1, 1888, 25 Stat. 452, recited this agreement with the Indians, and after numerous provisions, not necessary here to be noted, provided by Section 11 as follows:

> "That there be, and is hereby, granted to the Utah and Northern Railway Company a right of way not exceeding 200 feet in width," etc.

By Section 14 of the Act of Congress it was provided, but not because of any agreement with the Indians, that the railway

company should execute a bond to the United States conditioned for the

> "due payment of any and all *damages which may accrue* by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the *damages* in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho," etc. (See Appendix "1").

It seems to us therefore inaccurate to say, as is done at page 10 of the appellant's brief, that the "Indians bargained for a bond in the amount of $10,000," or that "the United States *and* the Indians sought and the railroad understood that it was to assume a larger responsibility" (p. 10) or that "* * the United States *and* the Indians made an agreement to grant" (p. 10). All that the Indians bargained or agreed for was a price per acre somewhat in excess of that which they had previously received from another company (R. 15); and that agreement of relinquishment was as "solemn" as the agreement creating the Indian reservation (R. 4, 7). By the agreement to pay $8.00 per acre for the right of way the red man's "dread of the approach of the white man's commerce" and of the "locomotive and/or iron horse," assumed by the appellant (R. 5) was fully overcome, without the requirement by them of a bond, to the great satisfaction of the United States, and the Committee of Indian Affairs (R. 19), and to Congress, who accepted the recommendations of the report, from which report it appears that the advent of the locomotive, operated on a line of railroad, extending easterly

and westerly through Pocatello, by another company, and the advent of the white man were already independently accomplished facts (R. 16, 17).

ARGUMENT

I.

Neither the statute nor the bond created a new right—they simply provide security for the payment of legal damages which might accrue.

Nowhere, either in the treaty or in the act of Congress, is there any express statement that the liability of the railroad company for death of an Indian or injury to his property shall be different or greater than that imposed by law as administered by the courts of the United States or of the state of Idaho. Under the law as so administered liability did not result from the mere killing or maiming without negligence, of a human being, which is all we are considering in this instance, and appellant has not referred us to any statute or decision to the contrary. In no case did such liability arise without fault or negligence on the part of the person charged, consequently there could be no "damages which may accrue," or otherwise stated, damages could not accrue from the mere circumstance of the injury without fault, as indicated in the opinion of the District Judge (R.36-42), and the courts will not assume an intention on the part of the legislature, or of congress, to create a new right or an absolute or unconditional liability where none existed before, unless it very clearly appears from the language employed that they intended to do so.

Globe and Rutgers Fire Insurance Co., vs. Draper, 66 Fed. (2d) 985, 991;

T. & P. R. Co., vs. Abilene Cotton Oil Co., 204 U. S. 426, 436, 437.

"The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. Gardner vs. Collins, 2 Pet. 58, 93; United States vs. Goldenberg, 168 U. S. 95."

Thompson vs. United States, 246 U. S. 547, 62 L. Ed. 876.

The language to be construed is that portion of Section 14 of the Act which requires the railroad company to furnish a bond for the use and benefit of the Indians:

"conditioned for the due payment of any and all *damages* which may *accrue* * * *, the *damages* in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed."

The complaint appears originally to have been drafted upon the theory that the defendants were by virtue of the statute and the bond obligated unconditionally to pay $10,000.00, the full amount of the bond, because of the death of the Indians, for after alleging the death of the Indians and a refusal of the defendants to make an amicable settlement and "pay the obligations incurred by said defendants under said bond and act of Congress," and alleging that the funeral expenses amounted to $2,500.00, it is averred:

"That by reason of the matters and things herein

> alleged and set forth there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest the sum of $10,000.00" (R.12)

After alleging such amount to be due by virtue of the matters above recited, it was added that the Shoshone and Bannock tribes of Indians and their heirs, representatives and parties in interest of the deceased persons had been damaged in excess of $10,000.00.

The contention of the appellant on this point was clearly untenable however, because, if it were otherwise, they could have come into court and demanded $10,000.00 for the killing of a calf or the starting of an inconsequential fire (R.9).

It is not certain whether this theory was abandoned before or after the rendition of the decision appealed from, because the defendants, by their answer to paragraph XIV (R.12) put in issue the fact as to whether the burial expenses amounted to $2,500.00, or any sum in excess of $500.00, and denied all of the averments of paragraph XIV, except the demand by the plaintiff of $10,000.00 and the refusal of the defendants to pay or agree upon settlement, and thereafter the appellant moved for summary judgment (R.34). By the brief it now appears that the appellant's contention is narrowed to the question of whether the plaintiff was entitled to recover $10,000.00, or some other sum, upon mere proof of the death of the Indians in the crossing collision, without evidence as to whether the railroad company was negligent or whether the death of the Indians was due to unavoidable accident or whether the proximate cause of their death was any act of

the railroad company, either with or without fault. The portion of the opinion dealing with this latter phase of the question appears at page 40 of the transcript and is assigned as a reason for the holding of the court which has been appealed from.

For the purpose of determining the intent of this statute it is necessary to consider the meaning of two words in their commonly accepted sense, unless for some very cogent reason it appears that there was a contrary intention on the part of Congress or the defendant railroad company and its bondsman.

> Cumberland Tel. Co. vs. Kelly, 160 Fed. 316;
>
> Old Colony R. Co., vs. Commissioners, 284 U. S. 552, 560, 76 L. Ed. 484.

"Damages"

The word "damages" is a noun; it is used to express the compensation awarded by the law for the violation of a legal right.

> " 'Damages' is the sum of money which the law awards or imposes as pecuniary compensation, recompense or satisfaction for an injury done or a *wrong* sustained as a consequence either of a breach of a contractual obligation or tortious act."
>
> 15 Am. Juris. 387, Sec. 2 "Damages," citing U. S. Steel Prod. Co., vs. Adams, 275 U. S. 388, 72 L. Ed. 326.

"Damages sustained are to be regarded as the result of a wrongful act."

Tetzner vs. Naughton, 12 Ill. Ap. 148, 153.

"Damages have been defined to be the compensation which the law will award for injury done."

Scott vs. Donald, 165 U. S. 58, 86.

"Damages are the pecuniary consequence which the law imposes for the breach of some duty or violation of some right."

Dean vs. Williamette Bridge Co., (Ore.) 29 Pac. 440, 442.

"Accrue"

When a legal right has been violated damages accrue.
United States of America vs. Oregon Short Line

Railroad Company, et al (R.38-39).

What the appellant actually asserts, we believe, upon the facts alleged, is that someone has been damaged (a verb), but, as indicated by the District Judge, such a situation may have come about without any fault or negligence on the part of the railroad company or without its act even being a proximate cause of the injury (R.40). The negligence of those operating the automobile may have been the sole proximate cause, or it may have been an unavoidable accident. It is not suggested by the appellant that a right of action for death without negligence existed in the State of Idaho at the time of the passage of the act. Such a right of action did exist where death was caused by wrongful act.

"When the death of a person, not being a minor,

is caused by the *wrongful act or neglect* of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Idaho Code of Civil Procedure, 1881, Sec. 192.

See: Section 5-311 I. C. A. 1932.

Without this provision there would have been no right of action for death in the State of Idaho. With such provision in the statutes of the State of Idaho at the time of the enactment by Congress of a law providing for the recovery of damages for death the natural intendment would be that the provision meant such damages as might accrue within the forum where the death occurred and where there existed some guide to the grounds of liability and measure of damages. In the absence of such a guide, how could it be said what damages might accrue? Especially, how could this be said when no damages accrued within such forum except as a result of a wrongful act?

"According to Webster's and Bouvier's definitions of 'accrue', it is sufficiently accurate to say that when the two elements constituting a cause of action, viz., a right possessed by the plaintiff on the one hand, and the infringement thereof or *delict* of the defendants on the other, both coexist—(arise, happen or come to pass)—they are combined and a cause of action accrues at that moment."

Bennett vs. Thorne, (Wash.) 78 Pac. 936, 940, 68 L. R. A. 113.

See also: National Lead Company vs. City of New York, 43 Fed. (2d) 914, 916;

Ercanbrack vs. Faris (Ida.) 79 Pac. 817, 819.

As was suggested by the District Judge, and also by this Court in Liebes vs. Commissioner of Internal Revenue, 90 Fed. (2d) 932, 936, there is a close analogy between the expressions "damages which may accrue" and "damages which may become due". This reasoning is also well supported by the authorities above cited.

An amount *due,* in the primary sense, means "owing."

United States vs. Bank of North Carolina, 8 L. Ed. 308, 31 U. S. (Pet.) 29, *36*;

Sather Banking Company vs. Briggs Company, 72 Pac. 352, 355;

Smith vs. Miller, (S. D.) 237 N. W. 827, 831.

Griffith et al., vs. Speaks, et al, 63 S. W. 465, was a suit on a bond given to release the levy of a distress warrant. The plaintiffs moved for judgment on the bond, and the defendants filed their answer resisting judgment upon the ground that they were not indebted to the appellant for the amount claimed, or for any sum for the keep of one mare. A general demurrer to the answer was sustained, and in reversing the Supreme Court of Missouri said:

"It is contended by counsel for the appellant that,

> after appellants executed the bond under section 653 of the Civil Code of Practice, they were limited by section 654 to the grounds of defense that the debt for which the agister's warrant was sued out had not matured or become due, or that it was levied upon exempt property; that the word 'due' in section 654 referred only to the maturity of the rent. We cannot believe that the legislature intended to put any such restricted meaning upon the word as used in this section of the Code. The word 'due', in its ordinary sense, means 'that which is justly owed; that which law or justice required to be paid or done'."

At pages 8 and 9 of appellant's brief the decision of this court, Liebes & Co., vs. Commissioner of Internal Revenue, 90 Fed. (2d) 932, 936, is quoted very briefly on the point of when a cause of action accrues. In that opinion immediately after the following words quoted in appellant's brief:

> "As a general statement, the word 'arose' seems most expressive."

appears the following:

> "However, such a general definition must be considered in connection with the use of the word. We must, therefore, determine what is meant by the words 'income accrued' as used with reference to income tax returns,"

following which the court cites a number of decisions of the United States Supreme Court to the effect that such a contingency comes into existence upon the development of an "unconditional liability" a "claim of right", "when the right to receive an amount becomes fixed, the right accrues", "when

the liability is uncontested and certain". Therefore, as was stated by the District Court (R. 39) damages did not accrue from the mere circumstance of the death of the Indians in a crossing collision and without regard to the rules of decisions by which the expressions "damages" and "accrue" were commonly understood in law.

We have been cited to no decision which holds that the rules of statutory construction which were applied by Judge Cavanah in this case should be or ever have been overruled out of solicitude for the Indians on the theory that, irrespective of the language employed or the legal effect of the words used, Congress must have intended (appellant's brief p. 6) to create an innovation or enlargement upon existing law. None of the decisions cited by the appellant support such a contention.

The first authority cited by the appellant on this point is Alaska Pacific Fisheries vs. United States, 248 U. S. 78, and the second one is Choate vs. Trapp, 224 U. S. 665. The decisions, it will be observed, are cited in the inverse order of their rendition. Analyzing them in the order of their rendition we find that Choate vs. Trapp involved a contention by 8,000 Choctaw and Chickasaw Indians who held land in Oklahoma under grants which contained provisions "that the lands should be nontaxable" for a limited time. After the issuance of the patents to the Indians Congress passed a general act removing restrictions against sale of the land by the Indians and providing that in such event the tax exemption should cease to exist, whereupon the state of Oklahoma undertook to tax the lands, and, based upon the statutes of the United States and treaties which expressly provided that each member of the tribe should have alloted to him a share of the land, all of

which, "shall be non-taxable while the title remains in the original allottee," and that the patents issued to such allottees "should be framed in conformity with the provisions of the agreement," the court held on the plain language of the patents and the statutes that the land was not subject to taxation by the State of Oklahoma. There the court, contrasting tax exemption granted by states where the state received nothing and the beneficiaries of the exemption gave nothing for the provision of the law allowing such exemptions, said:

> "There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.
>
> "But in the *government's* dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the *United States,* are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. * * * *"

The language as applied to the facts of that case was appropriate, and upon the facts of the case there could be no question but what the court was fully warranted in arriving at the conclusion that under the language employed the tax exemption should be sustained.

Alaska Pacific Fisheries vs. United States, supra, was another case involving the interpretation of statutes as between

the United States and the Indians, and involved the fishing rights of Indians in Alaska, and, upon the considerations expressed in the opinion, which seemed amply to warrant the conclusion arrived at, the court cited the case of Choate vs. Trapp, supra, as a rule of law construing doubtful expressions as between the United States and the Indians.

We fail to see how either of those decisions, or the rule therein announced, may be of service in an attempt to reverse the opinion of the lower court herein, for in the application of the rule to the facts of the two foregoing cases the decisions were amply justified, and it was not stated in those decisions, or any others that have come to our attention, that the rule therein announced is in conflict with or should override any rule upon which the decision of the district court was rested.

The argument of the appellant in this connection (p. 9) is based upon a composite or build-up of the rule governing interpretation of treaties and agreements between the United States and the Indians, and the following further premises, which we do not think are warranted by the facts of the opinion of the lower court. It is asserted that the district court approached the question at issue as if only a general statute regulating railroad liability was involved (p. 9), and that assertion is followed with a citation of Castril vs. Union Pacific Railroad Company, 2 Ida. 576, 21 Pac. 416, wherein it was held that a statute creating absolute liability for the killing of livestock without fault or negligence on the part of the railroad company was unconstitutional. Judge Cavanah's opinion did not proceed primarily upon the basis of this decision but proceeded upon giving to the language employed in the statute and the bond the normal and usual interpretation applied by the courts upon the principle that—

> "If the language used expresses the intention, reasonably intelligent and plain, the court must accept it without modification by resorting to conjecture or construction. Congress must be presumed to use words in their ordinary and known signification; Thompson v. U. S. 246 U. S. 547; Old Colony R. Co., vs. Comm's 284 U. S. 552-560." (R. 39).

We are unable to find any citation of relevant authority in appellant's brief which indicates that this rule is inapplicable or that it was improperly applied in the facts of the case. If we correctly understand appellant's argument, it is that according to the report to Congress it was stated that provision had been made for indemnification by the railroad company to the Indians for the killing or maiming of Indians or their livestock, and that the committed believed that every interests of the Indians had been jealously guarded and protected.

The giving of the bond constituted a provision for indemnification of the Indians and assured to them a solvent creditor for the payment of damages which might lawfully accrue to them in consequence of the invasion of their rights, whereas, without the bond the Indians would have had to rely for the settlement of an agreed liability or the collection of a judgment upon the solvency of a railroad company pioneering in the '80's in an undeveloped country. This, together with the $8.00 per acre which the railroad company was to pay for the right of way, was ample justification for the assertion by the committee that the rights of the Indians had been jealously guarded.

The use in the report of the expression "indemnification" must be determined by reference to the statute and the bond given by the railroad company and accepted by the Govern-

ment. The reasonable import of that word is consistent with the finding of the lower court.

> Allen vs. Aetna Life Insurance Co., 76 CCA 265, 145 Fed. 881;
>
> Henderson Light & Power Co., vs. Maryland Casualty Co., (N. C.) 69 S. E. 234, 30 L.R.A.N.S. 1005;
>
> Frye vs. Bath Gas & Electric Co., 97 Maine 241, 59 L. R. A. 444.

There can be no indemnification where there is not legal liability, and the ultimate interpretation of the expression "indemnification" falls back upon the language of the statute and the bond, "damages which may accrue."

At page 9 of the appellant's brief we read:

> "It (the opinion) stated that the statute should be strictly construed as it was in derogation of common law (R. 41)."

That the court did not so state nor apply such a rule is apparent from the record and the decisions cited in support of the reasons assigned by the court; what he said was:

> "The statute will not be construed as taking away a common law right unless such common law right is by express words, embodied in the statute, and courts will be reluctant to construe such a statute in derogation of the common law. Globe & Rutgers Fire Insurance Company vs. Draper (9th C) 66 Fed. (2) 985." (R. 41).

This rule does not appear to be challenged by the appellant

but in place thereof they set up for challenge a different proposition, which the record does not support.

Finally the suggestion is made in the Government's brief that the act of congress in question is a grant and that grants by the United States are to be strictly construed against the grantee, citing Hannibal, etc., Railroad Company vs. Missouri River Packet Company, 125 U. S. 260 (p. 9-10) and that the agreement for the bond is merely an extension of the grant. The decision relied upon is not analogous nor in point. It dealt with a grant or privilege with no consideration being given therefor, and no contractual obligation. In the case at bar the rights of the railroad company do not rest primarily upon a grant but are based upon an express agreement of the Indians ratified by Congress, and the subsequent provision in the act for the giving of a bond is no part of the agreement and no part of the grant. See Appendix "1". The Act recites that the agreement "is hereby accepted, ratified and confirmed"; the agreement there referred to recites:

> "The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of $8.00 for or in respect of each and every acre of land of the said reservation taken and used for the purpose of its said railroad, the said Utah and Northern Railroad Company *shall have and be entitled to* a right of way not exceeding 200 feet in width," etc.

The land was thereby transfered or conveyed by the Indians, subject to ratification by Congress, by as "solemn" an agreement as the one so characterized in the complaint, by which the reservation was created (R. 4) ; and the ratification thereof

by Congress was not in any proper sense a grant, but was in the nature of a quit-claim or trustees conveyance. Therefore the rule of construction of government grants, either gratis or otherwise, as applied in suits to which the Government is a party has no application to this case. The discussion and authorities appearing at pages 11 and 12 deal only with a question of *power* and not with statutory interpretation and, as will hereafter appear, the cases cited do not support the appellants' contention. The discussion appearing at pages 13 and 14 of the brief seeks to establish an interpretation of the statute in issue by reference to another statute granting a railroad right of way which in turn appears never to have had judicial interpretation. If either of the statutes in question had been judicially interpreted it is a reasonable assumption that the appellant would cite such decision or decisions. In the absence of such a showing it is somewhat remarkable that the appellant should now be contending for such a harsh and untenable construction after a lapse of 52 years since the enactment of the statute.

A further matter of curiosity, which the District Court deemed worthy of consideration and weight, is that portion of Section 14 of the act, which reads as follows:

> "the damages in all cases, in the event of failure by the railway company to effect amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed," etc.

We quote from the opinion as follows:

> "The expression in the statute, 'in the event of failure by the railway company to effect an amicable settle-

> ment with the parties in interest' clearly indicates that Congress intended the railroad company and the parties had the right to consider how the injury occurred and not that the plaintiff could assert unconditional liability." (R. 41-42).

Also, we may inquire, What was the purpose of the provision contained in Section 13 of the act, to the effect:

> "that said railway company shall fence and keep fenced, all such portions of its road as may run through any improved lands of the Indians,"

if the railroad company was to be liable in any event for all animals killed irrespective of fault or negligence on its part?

II.

The imposition of liability, regardless of fault, under the statute in question, would be an unconstitutional interpretation, which defense the appellees are not estopped from asserting.

The appellees are not estopped.

The appellant's argument on this point assumes the correctness of its previous argument, and the foreclosure of the appellees to question it, as a necessary premise to appellant's asserting estoppel. The rule supported by the decisions cited by the appellant applies only where the language of the statute is sufficiently clear that it can be said that the party challenging the constitutionality of the statute knew when he accepted the benefits of the statute that he was submitting to the interpretation contended for by his opponent, otherwise there could be no element of estoppel. If the appellant were

able to show by the record such an interpretation of the statute as is now made by it prior to the acceptance of the grant by the railroad company its position concerning the question of estoppel might be tenable. In the present condition of the record its position on this point is untenable.

International Steel & Iron Co., vs. National Surety Co., 297 U. S. 657, 665, 80 L. Ed. 961, 966;

Abie State Bank vs. Bryan, 282 U. S. 765, 776, 75 L. Ed. 690, 703.

III.

The imposition of unconditional liability is unconstitutional

Appellant's authorities on this point are cited at pages 11, 12 and 16 of their brief. All of those decisions are based upon different principles than those involved in the present situation, which do not have to be here discussed as they are fully distinguished in a note which covers the case to date in 53 A.L.R. 879-881. In that note, which begins at page 875 and extends to 884, inclusive, it will be found that absolute liability for damage by fire rests upon a different basis.

St. L. & S. F. Co., vs. Mathews, 165 U. S. 1, which creates an absolute liability for damage caused by fire was based upon the common law duty of one to control his own fires. That distinction applies to Martin vs. N. Y. & N. E. R. Co., quoted at page 12 of appellant's brief.

Missouri Pacific Ry. Co., vs. Humes, 115 U. S. 512, cited at page 11 of appellant's brief, was a case imposing a penalty for failure to fence.

All of the other cases cited by appellant in that connection are distinguished in the foregoing note to 53 A.L.R.

CONCLUSION

It is submitted, first, that the statute does not purport to, and does not, impose an absolute or unconditional liability, regardless of fault or negligence, for the killing of Indians or their livestock; secondly, that the appellees are not estopped to contest the contention of the appellant in that respect, and thirdly, that if it shall be held that it was the intention or declared purpose of the act to create liability for the death of an Indian without fault or negligence on the part of the railroad company, the statute is, to that extent, unconstitutional and violates the rights secured to the appellees under the Fifth Amendment to the Constitution of the United States.

Respectfully,

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APPENDIX "1"

From 25 Stat. L. 452

AN ACT to accept and ratify an agreement made with the Shoshone and Bannock Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purposes of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannock Indians resident in the Fort Hall Reservation in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannock tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hundred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior for this purpose, and the Shoshone and Bannock tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries ,that is to say: and comprising the following lands, all in town six (6) south of range thirty-four (34) East of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35); northeast quarter of the northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be surveyed (if it shall be found necessary) by the United States and laid off into lots and blocks, as a townsite, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

Whereas, in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment, of any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

Whereas the treaty between the United States and the Shoshone and Bannock Indians, concluded July 3, 1868 (15 Stat. at Large, page 673) under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of ($8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purposes of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width, through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafter filed by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter

during their occupancy of said reservation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ART. III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

"Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannock tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27) day of May, A. D., one thousand eight hundred and eighty-seven (1887)."

(Here follow the signatures.)

* * * * *

SEC. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracks, and then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof;